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No. 83 52

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GERALD F. AND DELORES TAYLOR,

PETITIONERS,

V.

THE LAWSON MILK COMPANY AND ROBERT A. DIXON,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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SUITE 1590
COLUMBUS, OHIO 43215
614/221-3006

COUNSEL FOR PETITIONERS

QUESTION PRESENTED

Whether a series of seven (7) armed robberies at the same business location within a span of four (4) years constitutes a sufficient notice to the business occupier requiring additional safety measures to be undertaken to deter an eighth (8th) armed robbery and, if no additional safety measures are undertaken, does plaintiff state a cause of action in negligence to warrant a trial on the merits as required by the Seventh and Fourteenth Amendments to the United States Constitution.

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IN THE
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GERALD F. AND DELORES TAYLOR,

PETITIONERS,

V.

THE LAWSON MILK COMPANY AND ROBERT A. DIXON,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OHIO

Petitioners, Gerald F. and Delores Taylor, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINION BELOW

The opinion of the Supreme Court of Ohio and of the Ohio Tenth Appellate Court of Appeals upon which its foundation in law is grounded

(Appendix, infra) is not reported.

JURISDICTION

The Judgment of the Supreme Court of the State of Ohio was entered on April 13, 1983 (Appendix, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) and Rule 20.2 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS

The Seventh Amendment to the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact, tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution (Due Process of Law) states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

The Lawson Milk Company (Lawsons) opened a carry out business at 3495 Parsons Avenue, Columbus, Ohio on April 18, 1975. From that date until June 28, 1979, this one business location was the site of seven armed robberies. While no one was killed or wounded in these armed robberies, several customers were assaulted. To emphasize the number of these armed robberies, the date and offenses are set out below:

DATE	CRIMINAL OFFENSE
1/12/76	Armed Robbery
10/20/76	Armed Robbery
11/19/76	Armed Robbery
04/02/78	Armed Robbery
02/11/79	Armed Robbery
02/22/79	Armed Robbery
05/14/79	Armed Robbery

These facts are not in dispute.

On June 29, 1979, petitioner Gerald Taylor entered the 3495 Parsons Avenue store to pur-

chase some chewing gum, and became the victim of an eighth (8th) armed robbery. Petitioner was shot in the back by a sawed-off shotgun fired by one Robert A. Dixon. Petitioner survived the blast, is severely crippled and continues to exist despite a five inch hole in his lower back and numerous internal injuries.

Petitioner and his wife, Delores, filed an action for damages in the Court of Common Pleas of Franklin County, Ohio against both Dixon and Lawsons. Petitioners alleged generally that Lawsons, 1) occupied the business premises at 3495 Parsons Avenue, Columbus, Ohio, for a business purpose; (2) knew or, in the exercise of ordinary care, should have known that criminal acts of third persons would again occur; and (3) with such knowledge, failed to take any additional steps whatsoever to protect the business invitee from that known danger. Petitioners' claim is set forth at § 344, Restatement of Torts 2d as follows:

> A possessor of land who holds it open to the public for entry for his business purposes is sub-

> ject to liability to members of the public while they are upon the land for such purposes, for such physical harm caused by the accident, negligent or intentionally harmfull acts of third persons or of animals, and by the failure of the possessor to exercise reasonable care to (1) discover that such acts are being done or are likely to be done, of (2) giving a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Petitioners filed several amended complaints and alleged these various theories of recovery:

(1) BREACH OF DUTY TO PREVENT THE BUSINESS INVITEE FROM WALKING INTO A ROBBERY (A SIMPLE LATCHING DEVICE WOULD HAVE PREVENTED APPELLANT'S ENTRY BUT NOT PRECLUDE ASSAILANT'S EXIT).

(2) BREACH OF DUTY TO CONSTRUCT ELECTRONIC DEVICES SUCH AS HORNS, NEON LIGHTS AND OTHER WARNING DEVICES TO ADVISE PATRONS TO STAY AWAY FROM THE PREMISES DURING AN ARMED ROBBERY.

(3) BREACH OF DUTY TO KEEP FREE FROM OBSTRUCTION A PATRON'S VIEW OF THE INSIDE OF THIS LAWSONS STORE.

(4) BREACH OF DUTY TO TAKE ANY EXTRA PRECAUTION IN PROTECTING THE BUSINESS INVITEE AT THE PARTICULAR BUSINESS PREMISE OF 3495 PARSONS AVENUE, COLUM-

BUS, OHIO.

(5) BREACH OF DUTY OF STORE EMPLOYEES FROM FAILING TO SIMPLY ADVISE APPELLANT TO "STAY OUT, A ROBBERY IS IN PROGRESS".

(6) BREACH OF DUTY IN FAILING TO ADD ANY SECURITY PERSONNEL WHATSOEVER TO DETER AN EIGHTH ARMED ROBBERY AT THE PARSONS AVENUE BUSINESS PREMISE.

(7) BREACH OF DUTY IN FAILING TO BE LINKED BY TV OR OTHER ELECTRONIC DEVICES TO LOCAL POLICE OR OTHER SECURITY FORCES.

(8) FINALLY, THAT THE CONDUCT OF LAWSONS AMOUNTED TO SUCH GROSS MISCONDUCT AS TO CONSTITUTE AN INTENTIONAL TORT.

Lawsons filed a motion for summary judgment with the trial court, contending that petitioners had not alleged any set of facts which would support a claim for damages under § 344 Restatement of Torts 2d. Lawsons did not contest the existence of seven prior armed robberies at its 3495 Parsons Avenue Store nor that it took no additional precautions at this store to deter the eighth armed robbery. Petitioners timely and properly countered Lawsons' motion with a memorandum contra, at-

taching supporting affidavits. The trial court sustained the motion for summary judgment and petitioners were denied their day in court.

Petitioners challenged the dismissal of their case in the Ohio Tenth Appellate Court of Appeals and the appeal was denied. (Appendix, infra). Petitioners sought jurisdiction in the Ohio Supreme Court and jurisdiction was denied. Rehearing was also denied.

Petitioners were denied by the Courts of Ohio their right to a jury trial as guaranteed by the Seventh (7th) Amendment and their right to due process of law as guaranteed by the Fourteenth (14th) Amendment.

REASONS FOR GRANTING THE WRIT

The State of Ohio denied petitioners their right to a jury trial and in so doing violated a right and privilege guaranteed by the United States Constitution.

The Seventh Amendment to the Constitution guarantees the right to a jury trial in civil cases. The Fourteenth Amendment to the Con-

stitution guarantees due process of law in civil cases. Petitioners set forth a plain and concise complaint alleging negligence on the part of Lawsons for failing to take any additional precautionary measures to protect its business invitees notwithstanding seven armed robberies at one store location within a four year period. It was an agreed fact below that Lawsons had a standard robbery procedure manual at all its store locations. It was also an agreed fact that Lawsons took no additional measures to curb or deter further robberies, at this one store location, notwithstanding these seven prior robberies.

With this backbround, petitioners sought recourse in a court of law. They were denied that recourse and not given an opportunity to test their case before a jury of their peers. This injustice occured despite Lawsons' admission that had it taken such action to prevent further crime, the likelihood of its reoccurence would have been reduced by "a whopping

49 percent." This fact was released by Lawsons during the state court appellate process:

> Since the inception of the program one year ago this month, the incidence of armed robberies at Lawson's has dropped a whopping 49 percent.
>
> . . .
>
> The height markers are not going to jump off the door and put the handcuffs on a thief. . . but they do act as a visible deterent to robberies.

(Appendix, infra).

During the state appellate process, petitioners cited the Supreme Court of Ohio to the case of Butler v. ACME Markets, Inc., 89 N.J. 270 (1982) which had recently determined the identical issue. At page 1146 the Court held:

> Thus under both Restatement, (Second) of Torts, § 344, supra, and the prior decisions of this Court, it was for the jury to determine if ACME exercised reasonable care in the performance of its duty to safeguard its business invitees from the criminal acts of third persons. Here, it was at least reasonable for the jury to determine that absent warnings, hiring one guard who primarily remained inside the store was an insufficient response in light of the known, repeated history of attacks on the premises.

(Emphasis added). Again, petitioners contentions were not considered.

Petitioners argue that they were denied "due process of law" by the State of Ohio as applied through the Fourteenth Amendment. This fundamental concept is best put forth in the case of Adamson v. California, 332 U.S. 46 (1947), where in the concurring opinion of Justice Frankfurter, it is said:

> Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples. . ..
>
> The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.

Clearly, petitioners had a "guaranteed right" to try their case to a court or jury, as they selected. The rules require only a "plain and short" statement of the facts; all doubt is

resolved in favor of the drafter. This Court has previously taken a strong stand that cases are tried on their merits, not disposed of by mere technicalities. In Foman v. Davis, 371 U.S. 178 (1962) it is held:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. . .. (O)utright refusal to grant the leave (to amend) without any justifying reasons appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

In the case at bar, petitioners did amend on three occasions and set forth a "plain and short" statement of the facts. Yet, they were denied access to the Courts of Ohio.

Because of the injustice above, petitioners have been denied due process of law. Certiorari should be granted to review this injustice and to send a loud message to the States that parties are permitted to try their cases in a court of law when any set of facts leave for

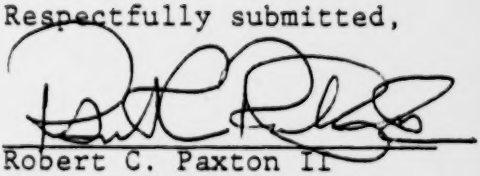
resolution a "question of fact" on culpability.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

DATED: COLUMBUS, OHIO
JULY 12 1983

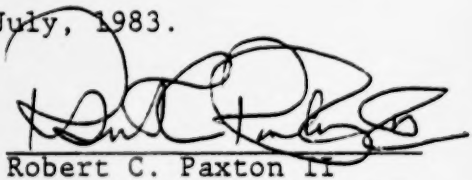
Respectfully submitted,



Robert C. Paxton II
Counsel for Petitioners
88 East Broad Street
Suite 1590
Columbus, Ohio 43215

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari was sent by regular United States mail to Thomas Young, Counsel for Lawson Milk Company, 37 West Broad Street, Columbus, Ohio 43215, on this 12th day of July, 1983.



Robert C. Paxton II
Counsel for Petitioners

APPENDIX

7-A

Kelley Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF OHIO

APR 14 1983

THE STATE OF OHIO,
City of Columbus.

19 83 TERM

To wit: April 13, 1983

Gerald F. Taylor et al.,
Appellants,

vs.

Robert A. Dixon et al.,
Appellees.

No. 82-106

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for FRANKLIN *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION ONLY
NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by Robert C. Paxton, II

I, James Wm. Kelly , Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

MAY 19 19

SC-18 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*83 *TERM*

To wit: May 18, 1983

Gerald F. Taylor et al.,
Appellants,
vs.
Robert A. Dixon et al.,
Appellees.

No. 83-105
REHEARING

It is ordered by the court that rehearing in this case is denied.

FOR YOUR INFORMATION ONLY
NOT FOR FILING

I, JAMES Wm. KELLY , of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th *day of* May *19*83

JAMES WM. KELLY *Clerk.*

By .....*Deputy.*

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

NOV - 1 1982

Gerald F. Taylor, Deloris Taylor, :

Plaintiffs-Appellants, :

v. : No. 82AP-180

Robert Allen Dixon and The Lawson Milk Company, Inc., : (REGULAR CALENDAR)

Defendants-Appellees. :

O P I N I O N

Rendered on November 30, 1982

MR. ROBERT C. PAXTON, II, for plaintiffs-appellants.

MESSRS. PORTER, WRIGHT, MORRIS AND ARTHUR, and MR. THOMAS A. YOUNG, MR. MASON EVANS, IV, and MR. MICHAEL J. ROURKE, for defendant-appellee The Lawson Milk Company, Inc.

APPEAL from the Franklin County Common Pleas Court.

MOYER, J.

This matter is before us on plaintiffs-appellants' appeal from a judgment of the Court of Common Pleas of Franklin County sustaining a motion for summary judgment filed by defendant-appellee Lawson Company.

Plaintiff Gerald Taylor was injured when he walked into a Lawson's store on Parsons Avenue during a robbery and was shot by

defendant-appellee Robert Dixon (Dixon). Plaintiff and his wife sued the Lawson Company (defendant) and Dixon claiming defendant negligently failed to maintain a safe premises for its business invitees by failing to warn plaintiff that a robbery was in progress and claiming that defendant's negligence was the proximate cause of plaintiff's injuries. Defendant argued in support of its motion for summary judgment that it had no duty to warn plaintiff of a robbery in progress, that no duty owed to plaintiff had been breached by defendant, and that any breach of duty by defendant was not the proximate cause of plaintiff's injuries.

The trial court sustained defendant's motion for summary judgment, finding that there were no genuine issues of material fact and that defendant did not owe a duty to plaintiffs under the facts presented. The trial court granted a default judgment on the issue of liability against defendant Dixon who had been convicted of the robbery on a guilty plea. The judgment against Dixon is not an issue in this appeal.

Plaintiffs amended their complaint once by right and requested leave to amend once before the trial court entered judgment against them. After the trial court sustained defendant's motion for summary judgment, plaintiffs filed several motions asking for leave to amend their complaint, for the trial court to reconsider its decision, for clarification of the judgment, for a continuance, and for the trial court to take judicial notice of several cases cited by the parties in their briefs and memoranda. The trial court agreed to take judicial notice of the cases but overruled plaintiffs' other motions.

Plaintiffs assert the following five assignments of error in support of their appeal:

APPENDIX C-1

1. "The trial court committed error in sustaining appellee's motion for summary judgment and thus taking from the appellants their day in court and presentation of their case to an impartial trier of fact."

2. "The trial court committed reversable [sic] error in failing to consider the facts alleged in appellants' amended complaint filed on January 8, 1982, the court refusing to consider the amended complaint based on its decision granting appellee summary judgment."

3. "The trial court erred in failing to reconsider its decision granting appellee a motion for summary judgment based on the memorandum and affidavits filed by appellants."

4. "The trial court erred in failing to allow appellants' amended complaint filed subsequent to the judgment entry of February 10, 1982."

5. "The trial court committed prejudicial error in failing to rule on appellants' motion to amend the complaint filed on February 24, 1982 prior to losing jurisdiction to the court of appeals on March 8, 1982."

Under Civ. R. 56(C), a trial court may enter a summary judgment if the pleadings and supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" and that reasonable minds can only conclude that the party filing the motion for summary judgment is entitled to a judgment. The plaintiffs argue that, since they denied each of defendant's statements, each material fact was at issue and summary judgment was, therefore, improperly entered. Yet, even construing all of the facts most strongly against defendant, summary judgment for defendant was properly entered if the applicable law does not support plaintiffs' cause of action.

In order to recover on a negligence claim, plaintiffs must

demonstrate that defendant owed them a duty, that the duty was breached, and that defendant's breach was the proximate cause of plaintiff's injuries. Bennison v. Stillpass Transit Co. (1966), 5 Ohio St. 2d 122, paragraph one of the syllabus. Defendant has argued that plaintiffs have not met their burden of proving even one of the three elements. Because the trial court's judgment was based on the first of the three elements and plaintiffs must prove all three elements in order to recover, we will focus on the first and most difficult element--whether defendant owed a duty to plaintiffs.

Plaintiffs and defendant have cited several cases to support their arguments that a duty either does or does not exist under the facts of this case. Four of the cases cited by the parties are particularly instructive on the question of whether defendant owed plaintiffs a duty. The first is Howard v. Rogers (1969), 19 Ohio St. 2d 42. In Howard, plaintiff was injured when a fight broke out at a teenage dance sponsored by defendants. The Ohio Supreme Court held that, although the occupier of premises may be liable to a business invitee for harm caused by third persons, the occupier is not liable for damages which it "does not, and could not in the exercise of ordinary care, know of." Howard, supra, at 47. The Hamilton County Court of Appeals, in Townsley v. Cincinnati Gardens, Inc. (1974), 39 Ohio App. 2d 5, also held that an occupier of premises is not liable to a business invitee for dangers which the occupier did not know of and could not reasonably have anticipated.

In the case at bar, plaintiffs argue that since defendant's Parsons Avenue store had been robbed seven times in four years, defendant should have known that the store was reasonably likely to be robbed

again, and that defendant should have taken such precautionary measures as providing an unobstructed view of the inside of the store through the front windows, constructing electronic devices such as horns, neon lights or other noise makers to advise potential patrons to stay away from the premises when a robbery was in progress and other preventive measures.

Defendant argues that, even if defendant could have anticipated an eighth robbery, since no one was injured in the previous robberies, defendant had no reason to foresee that the eighth robber might shoot a customer without provocation. Defendant relies upon Howard and Townsley to support its argument that it has no duty to protect business invitees such as plaintiffs from the unforeseeable danger of being shot by a robber upon walking into defendant's store.

Defendant's argument is further supported by the cases of Emm v. Sheskey (Feb. 14, 1980), No. 79AP-632, unreported (1980 Decisions 379) and Ross v. Nutt (1964), 177 Ohio St. 113. Although these two cases were concerned more with the element of proximate cause, in neither case was a duty imposed upon the defendant which would have required the defendant to exercise the power of double foreseeability. The present case also presents a question of double foreseeability since, in order to hold defendant liable under the facts of this case, a trier of facts would be required to find that defendant was required to foresee not only that its store might again be robbed, but also that the robber might shoot third persons without provocation. Although defendant has a duty to protect its business invitees from known or anticipated dangers, we agree with the trial court that defendant has no duty to warn potential customers that a robbery is in progress, because defendant did not know, and did not have

reason to believe, that a robber whose demands were being complied with would suddenly decide to shoot a customer. In fact, there is evidence that defendant's personnel were instructed to cooperate fully with a robber and to offer no resistance. It could reasonably be argued that, if defendant's personnel had attempted to initiate some kind of an alarm system during the course of the robbery, other people's lives may have been jeopardized. Under the facts of this case, we conclude that defendant had no duty to warn of dangers which it could not reasonably foresee. For this reason, plaintiffs' first assignment of error is overruled.

Plaintiffs' second and fourth assignments of error relating to the trial court's refusal to allow plaintiffs to amend their complaint are related and are considered together. Under Civ. R. 15(A), after a responsive pleading is served, a party may amend its pleading only by leave of court, but leave of court shall be freely given when justice so requires. Plaintiffs' second assignment of error challenges the trial court's refusal to allow them to amend their complaint before judgment was entered. Plaintiffs' fourth assignment of error asserts that the trial court should have allowed them to amend their complaint after the judgment was entered.

The thrust of plaintiffs' argument is that trial courts should hear cases on their merits rather than dismissing them for pleading deficiencies. In making this argument, plaintiffs misconstrue the trial court's judgment. Summary judgment was entered against plaintiffs not because of a pleading deficiency which could be corrected by an amended complaint, but because, regardless of the wording of plaintiffs' complaint, defendant owed plaintiffs no duty to warn of the robbery for

the reasons outlined in our disposition of the first assignment of error. Even if the trial court did err by refusing to permit plaintiffs to amend their complaint, such error was not prejudicial, and the second and fourth assignments of error are, therefore, overruled.

Plaintiffs' brief argument in support of their third assignment of error is not persuasive. Civ. R. 60(B) provides that relief from judgment shall be obtained "as prescribed in these rules." The rules do not provide for motions for reconsideration. Furthermore, plaintiffs have not argued on appeal that their "motion for reconsideration" was actually a motion for a new trial or a motion for relief from judgment. Therefore, since their motion is a nullity [Pitts v. Dept. of Transportation (1981), 67 Ohio St. 2d 378], plaintiffs cannot demonstrate that they were prejudiced by the trial court's decision to overrule their motion for reconsideration. Plaintiffs' third assignment of error is overruled.

In support of their fifth assignment of error, plaintiffs argue that the trial court erred in failing to rule on their last motion to amend their complaint before losing jurisdiction to the court of appeals. The judgment granting defendant's motion for summary judgment was filed on February 10, 1982. On February 24, 1982, plaintiffs filed a motion requesting the court to accept their third amended complaint. (This was actually the fourth amended complaint since plaintiffs had amended once by right before responsive pleading was filed.) Plaintiffs filed their notice of appeal with this court on March 8, and the trial court overruled plaintiffs' motion to amend on March 11, 1982. Plaintiffs' motion to amend was properly overruled for the reasons set forth in our discussion of assignments of error two and four. Furthermore,

plaintiffs have not cited, and we have not discovered, any authority supporting their claim that the trial court must rule on post-judgment motions within 30 days following the entry of a final judgment. The trial court's ruling, issued 15 days after plaintiffs filed their motion to amend, was timely, particularly since the trial court had previously reviewed and ruled on two of plaintiffs' similar post-judgment motions to amend. Plaintiffs' fifth assignment of error is not well taken and is overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

WHITESIDE, P.J., and NORRIS, J., concur.

DEC - . 1982

IN THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

TENTH APPELLATE DISTRICT

Gerald F. Taylor, Deloris Taylor, :

Plaintiffs-Appellants, :

v. :

Robert Allen Dixon, et al., :

Defendants-Appellees, :

No. 82AP-188
(Regular Calendar)

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on November 30, 1982, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas if affirmed.

WHITESIDE, P.J., MOYER & NORRIS, JJ.

By _____
Judge Thomas J. Moyer

cc: Robert C. Paxton, II
Thomas A. Young
Mason Evans, IV
Michael J. Rourke

APPENDIX D

COURT OF APPEALS
FRANKLIN CO. OHIO
1982 NOV 30 PM 12 51
- 33 -
THOMAS J. ENRIGHT
CLERK OF COURTS

Sun Warms Waverly Wood

Described as a trailblazer for other solar kiln projects, a pioneering solar lumber-drying kiln operation is nearing completion at the Sherwood Forest sawmill, one mile north of Waverly in Pike County.

"I hope to show that all kilns should be built this way. It's a wave of the future," says Project Manager Steve Dixon. Preliminary testing by researchers from Ohio State University and the Virginia Polytechnic Institute proved heat from the sun can dry lumber cost-effectively. Further, according to Dixon, the natural cycling of the sun combined with the low temperature of solar heat should yield a higher quality of wood.

"The moisture of the wood is allowed to surface and internal stresses are relieved," Dixon says. Such stress, present in most natural gas kilns, ruins the lumber.

Requiring about one-fourth more time to dry wood than traditional gas-burning kilns, the solar kiln will operate on a closed-loop system that constantly recycles warm air. Warmth from sunlight is magnified by panels of tempered glass positioned above blackened aluminum roofing. The kiln—funded by a 1980 $50,000 U.S. Department of Energy grant with an additional $30,000 contributed by Sherwood Forest—should be in service beginning this month. The first batch of lumber will be ready for market by fall.

Solar Solution: *Project Manager Dixon supervising kiln construction*

Sending Signals to Washington

Two Ohio town councils have recently started a trend that revives a very old, honorable and valuable way of communicating. Across the state, town councils are following the lead of Oxford and Yellow Springs in passing resolutions that call on the federal government to change national policy—in this case, to seek an international ban on nuclear weapons.

"It's a process of forcing issues . . . a practice that [had] gone out of style," explains Yellow Springs council member Tony Bent of the 19th-century practice.

The resolutions introduced to the Yellow Springs and Oxford councils were proposed by the Yellow Springs Coalition for Survival and the Oxford Citizens for Peace, respectively. Linda Kimball, coordinator of the Oxford group, says, "It's a resolution of emotional intent as opposed to a resolution with any legal intent."

So far, similar resolutions have been passed on the state level in seven states. Five other states, including Ohio, are considering like resolutions.

Letters to the councils from state and federal legislators in response to the resolutions have, for the most part, been noncommittal, says Bent. "Despite the magnitude of the issue, [the U.S.] Congress will . . . likely be politics as usual until enough state legislatures pass resolutions so Congress can't ignore it." That, in turn, Bent hopes, will "turn up enough pressure to force some action on the [Reagan] Administration."

Big Smiles, No Promotion

If you are a woman in a white-collar profession who feels she is being held back from advancement for some inexplicable reason, it might be because, among other reasons, you smile too much.

One aspect of a three-year study on male-female conversations that was prepared by Dr Carl Camden of Cleveland State University's communications department and Dr Carol Kennedy of Ohio State University's School of Nursing was to find why women were often interrupted by men during professional meetings.

Drs Camden and Kennedy videotaped groups to record the male-female interaction. What the researchers found was that three specific nonverbal actions lead women to be interrupt male colleagues which to male control of the c and, therefore, to male work tasks.

First, women "smile mor and . . . that leads to being in terrupted," Camden explains. Se ond, "women tend to lean back i their chairs, back away from the table. They don't lean forward That also leads to being interrupt ed." Third, Camden adds, is lack of eye contact.

Why do males react the way they do toward the females in these settings? "One [interpretation] is that men misinterpret what women are doing," Camden says. "Because men don't smile as much a women, they [might believe] tha women aren't as serious about wha they are saying. The other interpretation is the one most commonly held that men interpret the female smile as a submissive act."

One solution for women could be workshops where they can learn to change their behavior to compete better in the work place, suggests Camden.

APPENDIX M

Inch by Inch

Lawson's has taken the old adage "An ounce of prevention is worth a pound of cure" to heart. Except that it has converted the measurement from pounds and ounces to feet and inches, all as part of its recent crime prevention program.

New, brightly colored height strips running vertically along the edge of all the main doors of the stores owned by the Cuyahoga Falls-based carryout chain are used by clerks to measure the heights of incoming customers—and outgoing thieves.

Measuring Crime: *Lawson's Trayte*

"The height strips are part of a complete one-hundred-eighty-degree turnaround in how this company approaches its whole . . . prevention program," explains Ron Trayte, Lawson's director of loss prevention. One of Trayte's first moves as director was to hire former police officers who had specialized in crime prevention to head up regional loss prevention programs. From Reynoldsburg, he selected Mike Dempko to run the program for central Ohio.

"The best part [of the marker] is that the salesclerk can hand the officer a description and he can get it out to the other cruisers immediately," Dempko says.

Since the inception of the program one year ago this month, the incidence of armed robberies in Lawson's has dropped a whopping 49 percent. This figure includes stores in Lawson's four-state region of Ohio, Pennsylvania, Indiana and Michigan.

Trayte says he's convinced that these figures "can't be an accident."

The height markers are not going to jump off the door and put the handcuffs on a thief, he says, but they do act as a visible deterrent to robberies.

Supreme Court, U.S.
FILED
AUG 9 1983
ALEXANDER L. STEVAS,

No. 83-52

In The

Supreme Court of the United States

October Term, 1983

GERALD F. TAYLOR and DELORES TAYLOR,
Petitioners,

vs.

ROBERT A. DIXON and THE LAWSON COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT THE LAWSON COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THIS PROCEEDING

This case arises out of the shooting of petitioner Gerald F. Taylor by Robert A. Dixon. At the time of the shooting, Robert A. Dixon was robbing a retail convenience food store owned by respondent The Lawson Company (incorrectly referred to by petitioners Gerald F. Taylor and Delores Taylor as "The Lawson Milk Company"). The civil lawsuit instituted by petitioners Gerald F. Taylor and Delores Taylor in the Franklin County, Ohio Court of Common Pleas named both Robert A. Dixon and respondent The Lawson Company as defendants.

Robert A. Dixon did not enter an appearance at any time in this litigation, either at the trial level or the appellate level. Therefore, Robert A. Dixon is not a party to the proceeding presently before this Court, even though the cover of the "Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio" indicates otherwise. The sole respondent in the proceeding presently before this Court is The Lawson Company.

Pursuant to Rule 28.1 of this Court's Rules of Practice, respondent The Lawson Company hereby informs this Court that its parent corporation is Consolidated Foods Corporation.

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BRIEF OF RESPONDENT THE LAWSON COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In the interest of brevity, respondent The Lawson Company ("respondent") will not submit a separate state of the case. Respondent does, however, feel compelled to clarify a number of omissions and one misstatement contained in the statement of the case submitted by petitioners Gerald F. Taylor and Delores Taylor (hereinafter jointly referred to as "petitioners").

First, petitioners pointed out that it was undisputed that the Lawson store (hereinafter referred to as "the store" or as the "Parsons Avenue Lawson store") located at 3495 Parsons Avenue, Columbus, Ohio, was robbed seven times in the more than four-year period between April

1975—when it opened—and June 28, 1979—the date petitioner Gerald F. Taylor ("petitioner Taylor") was shot. However, petitioners failed to disclose that most of these prior robberies occurred in the darkness of evening or very early in the morning (5:00 a. m. or earlier). Petitioner Taylor, on the other hand, was shot at noon time, on a bright, sunny summer day.

Second, petitioners failed to point out that no customer was ever wounded or injured in any of the prior robberies.

Third, petitioners did not disclose that on the day petitioner Taylor was shot, a number of measures designed to deter robberies were in effect at the store. These measures included keeping the windows and glass doors of the store reasonably unobstructed so as to allow a clear view into and out of the store; placing the customer counter and cash registers at the front of the store, close to the windows and doors; installing a surveillance camera behind and above the customer counter and cash registers; placing decals on the doors informing potential criminals that "THIS BUILDING IS PROTECTED BY ELECTRONIC SURVEILLANCE EQUIPMENT"; and keeping the interior of the store brightly lighted.

Fourth, petitioners did not inform this Court that at the time of the Dixon robbery, respondent had in effect at the store the only sensible policy available to minimize the possibility of injury to customers or employees during a robbery: an express, written policy that all Lawson employees were to cooperate fully with the robber and do nothing to provoke him. It was undisputed that this policy was scrupulously adhered to during the Dixon robbery.

Fifth, petitioners did not mention that Robert A. Dixon, the criminal who shot petitioner Taylor while Dixon was robbing the store, stated in an affidavit submitted to the trial court in support of respondent's motion for summary judgment that immediately prior to the robbery, he had taken a large number of drugs; that during the robbery he was under the influence of these drugs; that there was no specific reason why he chose the Parsons Avenue Lawson store to rob, as opposed to other stores in the area; and that none of the Lawson employees in the store during the robbery resisted his demands or provoked him in any way.

Finally, petitioners' statement of the case and their brief in support of their request for a writ of certiorari erroneously informed this Court that despite the prior robberies at the store, respondent admitted that it took no additional security measures to deter future robberies at that store. There simply was no such admission at any point in this case.

SUMMARY OF ARGUMENT

1. Even assuming that the seventh amendment to the United States Constitution applies to actions in state courts, neither that amendment nor the fourteenth amendment to the federal Constitution prohibits the disposition of lawsuits by summary judgment. If there are no issues of fact on any one determinative issue in a civil case, summary judgment is appropriate and is not barred by the seventh amendment.

In a negligence action brought in an Ohio state court, the existence of a duty owed by the defendant to the plaintiff is a determinative issue. In the present case, there were no factual issues relative to the issue of respondent's duty to protect petitioners from the violent, unprovoked, criminal assault of a third person. The seventh amendment, therefore, did not prohibit the disposition of this case by summary judgment.

2. In order to invoke this Court's jurisdiction to review a state court decision, the alleged federal question in the state court proceeding must be raised in a timely manner. In the present case, petitioners failed to raise before the Ohio trial court, before the intermediate Ohio court of appeals, or before the Supreme Court of Ohio in their "Motion To Certify The Record", any issue concerning a violation of their federal constitutional rights. The first time such an issue was raised by petitioners was in their last document filed in state court—petitioners' application to the Supreme Court of Ohio to reconsider its overruling of their "Motion To Certify The Record." This Court has expressly held that an alleged federal question which is first presented to a state court in an application for rehearing before that state's supreme court is not seasonably raised, and raising the federal question at that late stage will not preserve the issue for review by this Court. *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

ARGUMENT

I. Neither The Seventh Nor The Fourteenth Amendments To The Federal Constitution Prohibits A State Court From Rendering Summary Judgment In A Negligence Case In Which There Are No Genuine Issues Of Fact As To A Determinative Issue.

The sole question presented in the petition in this case is stated as follows by the petitioners:

> Whether a series of seven (7) armed robberies at the same business location within a span of four (4) years constitutes a sufficient notice to the business occupier requiring additional safety measures to be undertaken to deter an eighth (8th) armed robbery and, if no additional safety measures are under taken, does plaintiff state a cause of action in negligence to warrant a trial on the merits as required by the Seventh and Fourteenth Amendments to the United States Constitution.

It is clear from this statement of the question presented that petitioners are arguing that this Court should sit as a "super state supreme court" to determine whether a certain set of undisputed facts constitutes a negligence claim in a state court action, which action, by virtue of the seventh and fourteenth amendments to the federal Constitution, cannot be disposed of by summary judgment. A review of relevant case law discloses that petitioners' argument is utterly without foundation.

The seventh amendment provides, in part, that: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." Petitioners' argument assumes that the seventh amendment to the United States Constitution is applicable to state court actions by virtue of the four-

teenth amendment's due process clause. This assumption is erroneous. *Olesen v. Trust Co. of Chicago*, 245 F. 2d 522 (7th Cir.), *cert. denied*, 355 U. S. 896 (1957).

Even ignoring petitioners' incorrect assumption, a number of cases have held that the granting of summary judgment, where there are no disputed issues of facts on a determinative issue, does not deprive the party against whom the summary judgment was entered of his seventh amendment right to a trial. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U. S. 315 (1902); *Oglesby v. Terminal Transport Co., Inc.*, 543 F. 2d 1111 (5th Cir. 1976); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F. 2d 1199 (9th Cir. 1974); *United States v. Stangland*, 242 F. 2d 843 (7th Cir. 1957). The rationale underlying these holdings is that a trial is only required if there are disputed issues of fact; if on any determinative issue in a case there are no factual questions, no trial is required.

In a negligence case brought in an Ohio state court, the existence of a duty on the part of the defendant to the plaintiff is a determinative issue. *Stamper v. Parr-Ruckman Home Town Motor Sales, Inc.*, 25 Ohio St. 2d 1, 265 N. E. 2d 785 (1971). In the present case, petitioners contended that respondent owed to them a duty to take precautions to prevent customers in the store from being injured by the violent, unprovoked, criminal acts of a third party. The sole factual basis upon which petitioners premised this alleged duty was the seven prior robberies at the store. The prior robberies were not disputed by respondent, and hence this action was particularly suited for disposition by summary judgment on the issue of respondent's alleged duty to petitioners.

There is no uniform federal common law which applies to tort claims between individuals brought in state court. *Cf. Miree v. DeKalb County*, 433 U.S. 25 (1977). Therefore, the decisions from other states concerning the issue of duty in a negligence action—such as the case of *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982), a case cited by petitioners before this Court—are not germane to an issue concerning federal constitutional rights. Although *Butler* is factually distinguishable from the present case, a decision of a New Jersey state court in a negligence action can have no relevance in determining whether petitioners, as a matter of federal constitutional law, have a right to have their case submitted to an Ohio jury. Such a right simply does not exist.

II. Petitioners Have Failed To Raise In A Timely Manner The Alleged Federal Question In This Case.

28 U.S.C. Section 1257, the statute controlling this Court's jurisdiction to review decisions rendered by state courts, provides, in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statues of, or commission held or authority exercised under, the United States.

It is settled law that if the alleged violation of federal constitutional rights is not seasonably presented at the state court level, this Court is without power to decide whether such a violation occurred. *E. g., Edelman v. California*, 344 U. S. 357 (1953).

The principle that federal questions must be seasonably raised in state court in order to allow this Court to review the final decision of the state court proceeding is also codified in this Court's Rules of Practice. Rule 21.1 (h) states:

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Petitioners have failed to comply with Rule 21.1 (h). The reason for such failure is clear: petiitoners did not seasonably raise in the Ohio state courts the alleged federal question they now wish this Court to consider.

The "Decision" of the trial court sustaining respondent's motion for summary judgment was rendered January 22, 1982. At this point in the proceedings, at the very latest, petitioners had to be aware of the alleged federal question which they now claim before this Court.

However, neither petitioners' "Motion for Reconsideration" filed in the trial court on January 25, 1982, nor their amended complaint filed the same day, mentioned any alleged federal constitutional issues raised by the granting of respondent's motion for summary judgment.

Similarly, petitioners failed to raise in their appeal to the Ohio Tenth District Court of Appeals any issue of violation of federal constitutional rights.

Petitioners' final recourse in the Ohio state courts was an attempt to have the Supreme Court of Ohio certify the record in this case and render a decision on the merits of the granting of summary judgment. Such a proceeding requires that the Supreme Court of Ohio first find that the case was one of public or great general interest: in other words, this proceeding was a discretionary appeal process. Article IV, Section 2 (B) (2) (d). In their "Motion To Certify The Record" filed in the Supreme Court of Ohio, petitioners once again totally failed to raise any federal question.

On April 13, 1983, the Supreme Court of Ohio overruled petitioners' "Motion To Certify The Record." On April 26, 1983, petitioners filed in the Supreme Court of Ohio an "Application For Reconsideration Of Appellants' Motion For An Order Directing The Court Of Appeals For Franklin County To Certify Its Record." The alleged federal constitutional violation now asserted by petitioners was first raised below in that application, which was petitioners' last possible remedy in the Ohio state courts. On May 18, 1983, the Supreme Court of Ohio overruled that application.

It is clear that petitioners have failed to raise in a timely manner in the state court proceedings the alleged federal constitutional issues now presented to this Court. This Court has expressly held that an alleged federal constitutional issue which is raised for the first time in an application for rehearing in a state supreme court is not seasonably raised, and therefore raising the federal question at that late stage will not serve as a basis of review by the Supreme Court of the United States. *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932).

———o———

CONCLUSION

Neither the seventh nor the fourteenth amendments to the United States Constitution prohibits the rendition of summary judgment in a civil case in which there are no questions of fact as to any one determinative issue. In the present negligence case, there were no questions of fact concerning the issue of respondent's duty to protect petitioners from the violent, unprovoked, criminal assault of a third party. Because the issue of respondent's duty was a determinative issue in this case, summary judgment was properly entered. This Court does not sit as a "super state supreme court" to determine that as a matter of federal constitutional law, a certain set of undisputed facts creates a jury issue in a negligence action brought in state court.

Additionally, petitioners have clearly failed to raise in a timely manner in the state court proceedings the alleged federal question which they now advance in this Court.

For these reasons, the "Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio" should be denied.

Respectfully submitted,

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OCTOBER TERM, 1983

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PETITIONERS,

vs.

THE LAWSON MILK COMPANY and ROBERT A. DIXON,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

REPLY OF PETITIONERS

Because of the seriousness of the omissions and misstatements contained in the brief of The Lawson Company ("Respondent") which bear directly on the case of Gerald F. and Delores Taylor ("Petitioners"), this Reply is required.

First, the Supreme Court will take notice that Respondent does not contest the seven "armed robberies" that took place at its store in Columbus, Ohio. The only contention (an issue of fact) is when the said robberies occurred, viz. in daylight or darkness.

Second, Respondent makes a misrepresentation when it is stated that "no customer was ever wounded or injured in any prior armed robbery." To reflect this misrepresentation, Appendix A speaks for itself in this regard.

Third, Respondent does not advise this Court that absolutely no additional security measures were taken whatsoever to protect the unsuspecting business invitee from April, 1975 through June 28, 1979, notwithstanding seven armed robberies. Petitioners arged from day one that this fact (no additional security measures) was an "issue of fact" for resolution by the jury, not summary judgment.

Fourth, Respondent misrepresents the fact wherein it is stated that an affidavit from the criminal himself (Robert A. Dixon) took away from the "trier of fact" the culpability of Dixon with respect to the criminal act. In fact, the record clearly reflects that Petitioners filed two affidavits with the trial court raising as an "issue of fact' the physical and mental condition of Dixon prior to the shotgun blast that permanently crippled Petitioner Gerald Taylor.

Finally, Respondent would have the Supreme Court believe that Petitioner failed to comply with the requirements of Rule 56 and otherwise did not put in issue every fact raised by said Respondent regarding this bizarre case for resolution by the jury. If there ever was a Seventh Amendment violation, this case is the forerunner.

SUMMARY OF ARGUMENT
REPLY OF PETITIONERS

The Seventh Amendment to the United States Constitution clearly prohibits the disposition of lawsuits by summary judgment when an issue of fact exists. Fidelity and Deposit Company of Maryland v. United States, 187 U.S. 315 (1902). In the present case, Petitioners clearly raised an "issue of fact" for resolution by the jury under § 344, Restatement of Torts 2d, where it was alleged in several amended complaints that Respondent occupied the business premises for a business purpose, knew, or in the exercise of ordinary care, should have known that criminal acts of third persons would again occur, and with such knowledge, failed to take any steps whatsoever to protect the business invitee from that known danger. Other than the standard literature sent out to all Lawson stores in 1975, Lawson took no additional steps at this particular Lawson store and yet, Petitioners' case was not permitted to go to the "trier of fact".

Respondents' assertion that Petitioners failed to raise a Federal question at the first available time is totally unfounded. So long as a Federal question was actually considered and decided by the state court, it has been held that the Supreme Court will not inquire how and

when the question was raised below. Manhattan Life Insurance Company v. Cohen (1914), 234 U.S. 123. In addition, a Federal question may be raised in the pleadings. Magwire v. Tyler (1869), 75 U.S. 650. A Federal question may be raised in objection to the court's disposition of the case and in posttrial motions. Manley v. Park (1903), 187 U.S. 547. In the case at bar, Petitioners asserted, from day one, that the trial court took from them their right to a trial by jury.

ARGUMENT
REPLY OF PETITIONERS

I. THE SEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION PROHIBITS A STATE COURT FROM RENDERING SUMMARY JUDGMENT IN A NEGLIGENCE CASE WHEREIN THERE ARE GENUINE ISSUES OF FACT FOR DETERMINATION BY THE TRIER OF FACT.

As early as 1902, this Court clearly espoused the Rule of Law that a state may not deprive an individual of his right to a trial by jury in a civil action. In Fidelity and Deposit Company v. United States, supra, this Court stated at page 320 the following Rule, applicable to the facts at bar: "If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without refer-

ence to cases." Also see Oglesby v. Terminal Transport Company, Inc., 543 F.2d 1111 (Fifth Circuit 1976); Diamond Door Company v. Lane-Stanton Lumber Company, 505 F.2d 1199 (Ninth Circuit 1974); and United States v. Stangland, 242 F.2d 843 (Seventh Circuit 1957).

In each of the above cases, the rationale underlying the same is that if a "disputed issue of fact exists, one is entitled to a trial by his peers.

In the case at bar, Petitioners allege a duty, breach of duty, proximate cause and injury. Accordingly, it was for the jury to determine whether Respondent, who admittedly took absolutely no preventive measures, exercised reasonable care in the performance of its duty to safeguard Petitioners from the criminal acts of third persons. At page 6 of Respondent's brief it is stated: "The prior robberies were not disputed by Respondent. . .". Nor was it disputed that Respondent took no steps in light of seven armed robberies to protect the business invitee from the acts of third parties. In the case at bar, Petitioner, Gerald F. Taylor, was the victim of the eighth armed robbery and was permanently injured by a shotgun blast as a result thereof. How this case did not present an "issue of fact" for the trier of fact is absolutely beyond imagination. Petitioners were denied their right to a trial by jury.

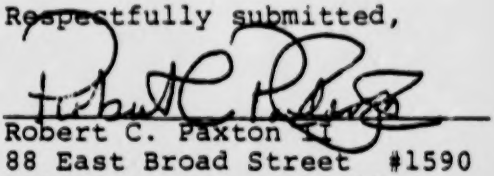
Unless the Supreme Court reviews this case on appeal, the Rule of Law in Ohio will permit the

business owner wider lattitude in recklessly disregarding the rights of his business invitee. To again appreciate the fact raised in several amended complaints that were disposed of by summary judgment, this Court must again review the "undisputed facts below".

DATE	CRIMINAL OFFENCE
01/12/76	Armed Robbery
10/20/76	Armed Robbery
11/19/76	Armed Robbery
04/02/78	Armed Robbery
02/11/79	Armed Robbery
02/22/79	Armed Robbery
05/14/79	Armed Robbery

If a business owner can stipulate the above track record and further stipulate that it took no additional measures to prevent another armed robbery, then we are in a sad state of affairs. It is absolutely essential that this Court permit this appeal in order that, on the merits, this matter will be remanded to the trial court for resolution on the merits.

Respectfully submitted,



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